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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

GERALD R. BENTON,
Petitioner,

v.

JAMES V. CROSBY,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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44 pp

A. QUESTION PRESENTED FOR REVIEW

Whether a certificate of appealability should have issued from the Eleventh Circuit Court of Appeals to allow review of the district court's denial, without an evidentiary hearing, of Petitioner Benton's habeas petition, wherein he raised the constitutional issues: (1) that his plea was involuntary due to the effects of psychotropic medication and (2) that his attorney rendered ineffective assistance of counsel for failing to advise him of the voluntary intoxication defense, when the record affirmatively shows that Petitioner Benton's pleadings made a "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. 2253(c)(2) and that his claims were clearly debatable amongst jurists of reason?

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.[1]

[1] When Petitioner Benton filed his habeas petition in the district court, Michael W. Moore was the secretary of the Florida Department of Corrections and was therefore named as the Respondent. Subsequently, James V. Crosby replaced Mr. Moore as secretary of the Florida Department of Corrections. The case was amended in the district court to reflect that Mr. Crosby was the proper Respondent. (A-30).

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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

GERALD R. BENTON,
Petitioner,

v.

JAMES V. CROSBY,
Respondent.

On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Petitioner, GERALD R. BENTON, respectfully prays the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 27 June 2003. (A-32). The nature of the judgment is an order denying Petitioner Benton's motion for a certificate of appealability.

D. CITATIONS TO OPINIONS BELOW

The opinion below, *Benton v. Crosby*, No. 03-12373-D (11th Cir. June 27, 2003), is unreported.

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1) to review the judgment of the United States Court of Appeals for the Eleventh Circuit denying Petitioner Benton's motion for certificate for appealability, rendered on 27 June 2003. (A-32).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

This case requires interpretation and application of the Sixth Amendment to the Constitution of the United States, which provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This case also requires interpretation and application of the Fourteenth Amendment to

the Constitution of the United States, which provides in pertinent part that no state shall "deprive any person of life, liberty, or property, without due process of law."

2. Statutory Provisions

28 U.S.C. § 2253 (Reproduced in Appendix, A-33).

G. STATEMENT OF THE CASE

1. State court trial facts.

Petitioner Gerald Benton was arrested on state charges on the afternoon of 30 April 1996 in Pensacola, Florida. He was subsequently charged by information with four counts: armed robbery with a firearm (count I), burglary of a dwelling with assault and battery (count II), burglary of a dwelling while armed (count III), and possession of a firearm by a convicted felon (count IV). On 02 July 1996, the State of Florida filed a Notice of Intent to Seek Habitual Felony Offender Sentencing.[2]

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[2]Pursuant to section 775.0835, Florida Statutes, a defendant sentenced as an habitual felony offender or habitual violent felony offender is subject to an enhanced sentence that may include a mandatory sentence equal to the statutory maximum punishment for the offense of conviction.

Petitioner Benton faced an enhanced life sentence for counts I and III as an habitual violent felony offender if convicted as charged. Shortly after the inception of the case, Assistant Public Defender Brenda Mader was appointed to represent Petitioner Benton.

On 16 October 1996, Petitioner Benton entered a plea of *nolo contendere* to the charges set forth in the information. (Ex. A, Pg 6).[3] On 05 December 1996,[4] defense counsel Mader informed the state trial court that Petitioner Benton wanted to withdraw his plea on the basis that he was under the influence of psychotropic medications at the time the plea was entered. The medications were given to him pursuant to his mental health treatment while he awaited trial at the Escambia County Jail. Due to the effects of the medications, Petitioner Benton

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[3]Record citations in this petition are to the exhibits attached to the Respondent's "Response to Petition for Writ of Habeas Corpus" filed in the district court.

[4]A transcript of the 05 December 1996 hearing was not included in the Respondent's exhibits. A copy of the transcript was attached to Petitioner Benton's Objections to Magistrate Judge's Report and Recommendation.

was unable to appreciate the consequences of the plea and the charges pending against him. The medications included Prozac, Triliphon, Cogentin, and Sinequan.

After Petitioner Benton advised the state trial court that he wished to withdraw his plea, defense counsel Mader told the court that she would "find out what type of medications he was on at the jail so that we can have *a full-blown hearing* on this issue." (Transcript of 05 December 1996 hearing at pg. 3) (emphasis added). The state trial court instructed defense counsel Mader that a motion to withdraw the plea must be filed with the trial court. No formal written motion was ever filed. Defense counsel Mader allegedly spoke to a "doctor" at the jail and obtained medical records for Petitioner Benton.

The state trial court conducted a brief inquiry regarding Petitioner Benton's claim on 20 February 1997.[5] (Ex. A, Pg

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[5]It is important to note that Petitioner Benton told counsel to move to withdraw the plea *prior* to the sentencing hearing, which was ultimately held on 20 March 1997. Florida Rule of Criminal Procedure 3.170(f) provides:

25). The inquiry, however, was not a *full-blown hearing*. No evidence or testimony was presented. At the beginning of the inquiry, the trial court asked counsel to come to side bar to discuss Petitioner Benton's motion to withdraw his plea. (Ex. A, Pgs 26-27). Defense counsel Mader told the state trial judge that she talked to Dr. Zoss, who told her that "there was no evidence of his ability to function neurologically being

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> Withdrawal of Plea of Guilty. The court may in its discretion, and shall on good cause, *at any time before a sentence*, permit a plea of guilty to be withdrawn and, if judgment of conviction has been entered thereon, set aside the judgment and allow a plea of not guilty, or, with the consent of the prosecuting attorney, allow a plea of guilty of a lesser included offense, or of a lesser degree of the offense charged, to be substituted for the plea of guilty. The fact that a defendant may have entered a plea of guilty and later withdrawn the plea may not be used against the defendant in a trial of that cause.

(Emphasis added.) "*All of the cases, both state and federal*, agree that [rule 3.170(f)] should be liberally construed to allow withdrawal of a guilty plea if justice or right and fairness so dictate and because the law is partial to a trial on the merits." *Vlacich v. State*, 536 So. 2d 1173, 1174 (Fla. 4th DCA 1989) (citations omitted) (emphasis added). "The law inclines toward a trial on the merits; and where it appears that the interests of justice would be served, the defendant should be permitted to withdraw his plea." *Shield v. State*, 744 So. 2d 564, 565 (Fla. 1st DCA 1999). "A defendant should be permitted to withdraw a plea if he files a proper motion and proves that the plea was entered under mental weakness, mistake, surprise, misapprehension, fear, promise, or other circumstances affecting his rights." *Id.*

Petitioner Benton maintains that the taking of psychotropic medications at the time of the plea constitutes good cause justifying the withdrawal of a plea. Hence, had counsel pursued Petitioner Benton's motion, the court would have been required to permit Petitioner Benton to withdraw the plea.

impaired." (Ex. A, Pg 27). The doctor was not present at the inquiry and did not personally testify. When questioned by the court, Petitioner Benton maintained that he "was impaired by all of the psych drugs that [he] was getting in the county jail." (Ex. A, Pg 28). Nevertheless, the state court accepted counsel's representation that "*we* do not have grounds to withdraw the plea."[6] (Ex. A, Pg 26) (emphasis added). Despite the apparent conflict between defense counsel Mader and Petitioner Benton (due to their contrary position as to whether the plea was involuntary), no opportunity was offered to Petitioner Benton to present evidence in support of his claim that he was affected by the psychotropic medications at the time of his plea. No inquiry was made of the "doctor" defense counsel Mader

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[6]As explained in footnote 5, counsel's representation to the court was incorrect. In fact, at the 05 December 1996 hearing, counsel also told the court "I'm aware that we have to have a legal reason." (Transcript of 05 December 1996 hearing at pg. 3). Contrary to counsel's assertion, even if good cause (or a "legal reason") is not established, a court still has the discretion to allow a defendant to withdraw a plea prior to sentencing. *See Catinella v. State*, 732 So. 2d 444, 445 (Fla. 4th DCA 1999) ("upon a showing of less than good cause, withdrawal of the plea is within the court's discretion").

consulted or any other expert as to the effect that the medications would have had on Petitioner Benton's ability to appreciate the consequences of his plea. In fact, the state court never inquired into what medications Petitioner Benton was even taking at the time of the plea. Instead, the state court simply made a finding that Petitioner Benton voluntarily and knowingly entered the plea.

The case proceeded to sentencing on 20 March 1997. After brief argument from Assistant State Attorney Edwin Zeitlin and defense counsel Mader, the state trial court sentenced Petitioner Benton to life imprisonment, with a minimum mandatory fifteen-year sentence, for the armed burglary and armed robbery convictions (counts I and III). (Ex. A, Pg 64). For the burglary with assault and battery conviction (count II), Petitioner Benton was sentenced to life imprisonment as an habitual felony offender. (Ex. A, Pgs 64-65). For the possession of a firearm by a convicted felon conviction (count

IV), Petitioner Benton was sentenced as an habitual felony offender to a term of thirty years' imprisonment. (Ex. A, Pg 65). All sentences were imposed concurrently.

2. Direct appeal to the District Court of Appeal, First Appellate District of Florida.

On direct appeal, Petitioner Benton, *pro se*, claimed that defense counsel Mader rendered constitutionally ineffective assistance of counsel by "fail[ing] to file a Motion to Withdraw a Plea [and] fail[ing] to conduct an adequate investigation into the facts of Benton's allegation that he was under the influence of psychotropic drugs at the time he pleaded No Contest to the charges against him." (Ex. A, Appellant's Brief). In its opinion, the First District Court of Appeal held that "[g]enerally, such claims must be raised in collateral proceedings, and are not cognizable on direct appeal." *Benton v. State*, 729 So. 2d 411, 411 (Fla. 1st DCA 1999).

3. State court postconviction proceedings.

Following the direct appeal, Petitioner Benton timely

filed a *pro se* motion for postconviction relief in state court pursuant to Florida Rule of Criminal Procedure 3.850. The motion was filed on 25 June 1999. Pursuant to the state appellate court's direction on direct appeal, Petitioner Benton alleged in the motion that "[t]he court should not have accepted petitioner's plea while he was under the influence of psychotropic drugs and suffering from mental illness." (Ex. B, Pg 106). Petitioner Benton claimed that his *nolo contendere* plea was not knowing, voluntary, or intelligent due to the effects of the medications. (Ex. B, Pg 36). Petitioner Benton specifically alleged in the motion that a hearing should have been held on his motion to withdraw his plea. (Ex. B, Pg 107).

Petitioner Benton also claimed in his state court postconviction motion that counsel rendered ineffective assistance of counsel by failing to apprise him of the defense of voluntary intoxication. Petitioner Benton alleged that had he known that the defense of voluntary intoxication was available,

he would have persisted in his not guilty plea and proceeded to trial. (Ex. B, Pg 37).

The state trial court summarily denied Petitioner Benton's postconviction motion on 26 January 2000. The state trial court held that Petitioner Benton's claim regarding the voluntariness of his plea "should have been asserted on direct appeal." (Ex. B, Pg 143).

On appeal, the First District Court of Appeal remanded the case for an evidentiary hearing on the issue of ineffective assistance of counsel for failing to advise of the voluntary intoxication defense. *See Benton v. State*, 763 So. 2d 548 (Fla. 1st DCA 2000). The state appellate court did not discuss the denial of Petitioner Benton's involuntary plea claim.

On remand, the state trial court held an evidentiary hearing on the voluntary intoxication issue on 19 September 2000, but the hearing was limited to whether counsel was ineffective for failing to advise Petitioner Benton of the defense

of voluntary intoxication. (Ex. B, Pg 195). The state trial court did not hold a hearing on Petitioner Benton's claim that his plea was involuntary due to the psychotropic medications that he was taking at the time he entered his plea.

The state trial court denied Petitioner Benton's postconviction motion on 16 February 2001. In denying Petitioner Benton's ineffective assistance of counsel claim, the state trial court applied the prejudice standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); the state court did not cite to *Hill v. Lockhart*, 474 U.S. 52 (1985), wherein the Court set forth the proper prejudice standard to be applied to an ineffectiveness claim in the context of a guilty plea. On appeal, the First District Court of Appeal *per curiam* affirmed the denial of Petitioner Benton's postconviction motion. *See Benton v. State*, 798 So.2d 725 (Fla. 1st DCA 2001).

4. Federal Habeas Corpus Petition under 28 U.S.C. § 2254.

On 10 June 2002, Petitioner Benton timely filed a

petition for a writ of habeas corpus in the Northern District of Florida pursuant to Title 28 U.S.C. § 2254. Petitioner Benton raised two claims in the petition: (1) his *nolo contendere* plea was not knowing, voluntary, or intelligent due to the psychotropic medications that he was taking at the time he entered his plea and (2) the state postconviction court did not correctly apply the tests set forth in *Hill* in answering the question of whether defense counsel rendered ineffective assistance of counsel by failing to advise Petitioner Benton of the voluntary intoxication defense. On 26 February 2003, the Honorable M. Casey Rodgers, United States Magistrate Judge, entered a Report and Recommendation recommending that Petitioner Benton's habeas petition be denied. (A-1). On 03 April 2003, the Honorable Lacey A. Collier, United States District Judge, entered an order denying the petition. (A-28). Petitioner Benton timely appealed the order and requested the district court to issue a certificate of appealability pursuant to

Federal Rule of Appellate Procedure 22 and Eleventh Circuit Rule 22-1(a). Petitioner Benton's request was denied by the district court on 07 May 2003. (A-30).

Petitioner Benton timely requested the Eleventh Circuit Court of Appeals to issue a certificate of appealability. On 27 June 2003, the Eleventh Circuit Court of Appeals denied Petitioner Benton's request for a certificate of appealability. (A-32). The Eleventh Circuit held that Petitioner Benton "failed to make a substantial showing of the denial of a constitutional right." (A-32).

H. REASONS FOR GRANTING THE WRIT

1. The Question Presented is Important.

A guilty plea must be entered knowingly, intelligently and voluntarily. *See Boykin v. Alabama*, 395 U.S. 238, 243 (1969). In evaluating the knowing and voluntary nature of a guilty plea, the Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent

choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

It is well-established that a plea taken while a defendant is incompetent violates due process of law. *See generally Godinez v. Moran*, 509 U.S. 394, 396 (1993) (holding that a defendant may not plead guilty unless entered competently). A defendant is incompetent to stand trial if he lacks sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, or he lacks a rational and factual understanding of the proceedings against him. *See Dusky v. United States*, 362 U.S. 402, 402 (1960).

In *Sanders v. United States*, 373 U.S. 1 (1963), the Court addressed a defendant's claim that he was mentally incompetent at trial and sentencing as a result of narcotics administered to him while he was in jail. The trial court refused to hold an evidentiary hearing on Mr. Sanders' claim. The Court remanded for an evidentiary hearing on the claim,

reasoning:

> However regular the proceedings at which he signed a waiver of indictment, declined assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that petitioner did not make an intelligent and understanding waiver of his constitutional rights. For the facts on which petitioner's claim in his second application is predicated are outside the record. This is so even though the judge who passed on the two motions was the same judge who presided at the hearing at which petitioner made the waivers, and the later hearing at which he was sentenced. *Whether or not petitioner was under the influence of narcotics would not necessarily have been apparent to the trial judge.* Petitioner appeared before him without counsel and but briefly. *That the judge may have thought that he acted with intelligence and understanding in responding to the judge's inquiries cannot 'conclusively show,' as the statute requires, that there is no merit in his present claim.* If anything, his request before sentence that the judge send him to a hospital 'for addiction cure' cuts the other way. Moreover, we are advised in the Government's brief that the probation officer's report made to the judge before sentence (the report is not part of the record in this Court) disclosed that petitioner received medical treatment for withdrawal symptoms while he was in jail prior to sentencing. *On remand, a hearing will be required.*

Id. at 19-20 (emphasis added).

As in *Sanders*, Petitioner Benton alleged in his habeas petition that his plea was not knowing, voluntary, or intelligent due to the psychotropic medications that he was taking at the time he entered his plea. This claim has been raised at every stage of the judicial process yet no court (state or federal) has held an evidentiary hearing on whether Petitioner Benton was under the influence of psychotropic medications at the time he entered his plea. Petitioner Benton raised the issue shortly after the plea was entered and prior to sentencing, but the state trial court failed to hold an evidentiary hearing to determine whether Petitioner Benton was in fact under the influence of psychotropic medications at the time he entered his plea. Petitioner Benton raised the issue on direct appeal, but the state appellate court told him that the claim was more properly raised in a postconviction motion. *See Benton v. State*, 729 So. 2d 411, 411 (Fla. 1999). Yet when Petitioner Benton raised the

claim in a postconviction motion, he was told by the state trial court that the claim should have been raised on direct appeal.

The state court's circular reasoning notwithstanding, no court has afforded Petitioner Benton his day in court to establish the extent to which the medications he was taking affected his ability to knowingly enter a plea. In *Miller v. Champion*, 161 F.3d 1249, 1253 (10th Cir. 1998), the Tenth Circuit Court of Appeals stated that "[w]e now join every other circuit that has confronted this question and hold that where, as here, a habeas petitioner has *diligently sought to develop the factual basis underlying his habeas petition, but a state court has prevented him from doing so*, § 2254(e)(2) does not apply."[7]

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[7] Title 28 U.S.C. 2254(e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(Emphasis added.) Petitioner Benton diligently sought, but was denied, the opportunity to present a factual basis to support his claim at each stage of his state and federal proceedings.

When a criminal defendant enters a guilty plea, he or she relinquishes a number substantial constitutional rights. Therefore, the burden is on the judiciary to ensure that the defendant's waiver of these important rights is in fact knowing, voluntary, and intelligent. As observed by former Chief Justice Major B. Harding of the Supreme Court of Florida:

> Prior to this nation's birth, the colonists were subjected to a system of government that denied individual rights and liberties and failed to provide due process. Based on their experience with the English monarchy and its courts, the founders of this country were determined to ensure that a number of individual rights and liberties were specifically provided for within the body of the

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(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Constitution. *Today these rights include the right to have effective assistance of counsel in criminal matters, the right against self-incrimination, the right to an impartial jury, the right to a fair trial, the right to confront one's accusers, the right to be presumed innocent until proven guilty, and the right that the government prove a criminal matter beyond a reasonable doubt.* These rights are available to all citizens, regardless of race, creed, or social status. History has shown that it is only when due process is strictly adhered to that judicial outcomes are credible. It has been said a number of times that it is more important that no innocent man be convicted than a guilty man go free. *See In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[I]t is far worse to convict an innocent man than to let a guilty man go free."); *Furman v. Georgia*, 408 U.S. 238, 367 n. 158 (1972) (Marshall, J., concurring) ("[I]t is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned.") (quoting William O. Douglas, Foreword to Jerome Frank & Barbara Frank, Not Guilty 11-12 (1957)).

. . .

. . . A plea of guilty cannot be entered to a judge or a jury without the defendant's consent. *It is not a theoretical gloss or a hypothetical exercise to require that a defendant, no matter how gruesome or horrible his crime, how guilty he is, or how good the trial strategy, be accorded those rights. The courts have consistently required a judge to*

> *make inquiry and determine that a guilty plea is voluntarily, intelligently, and freely entered.* We have developed a detailed rule setting forth specific procedures that courts must follow in making this determination. See Fla. R. Crim. P. 3.172. My research has not revealed a case where the failure to ensure that a defendant's plea of guilty was voluntary and intelligently entered was error subject to a harmless error analysis.

Nixon v. Singletary, 758 So. 2d 618, 626-27 (Fla. 2000) (Harding, C.J., concurring) (emphasis added). In light of the substantial constitutional rights involved, Petitioner Benton respectfully requests the Court to grant the petition.

2. The Decision of the Court of Appeals is Erroneous.

In his habeas petition, Petitioner Benton raised two issues. First, Petitioner Benton alleged that his guilty plea was not voluntary, knowing, or intelligent because at the time of the plea, he was under the influence of several psychotropic drugs which severely altered his ability to understand the plea. Second, Petitioner Benton asserted that the state court did not

correctly apply the tests set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and *Hill v. Lockhart*, 467 U.S. 52 (1985), in answering the question of whether defense counsel below rendered ineffective assistance of counsel for failing to advise him of the voluntary intoxication defense. Pursuant to the Court's recent decision in *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003), Petitioner Benton has met his burden of establishing that a certificate of appealability should have been issued to review the district court's denial of the claims set forth in Petitioner Benton's habeas petition.

Title 28 U.S.C. § 2253(c)(1) provides:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from —
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court.

Title 28 U.S.C. § 2253(c)(2) further provides that "[a] certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of

a *constitutional* right." (emphasis added).

In *Miller-El*, the Court observed that a certificate of appealability (COA) will issue only if the requirements of § 2253 have been satisfied. *See* 123 S. Ct. at 1039. "§ 2253(c) permits the issuance of a COA only where a petitioner has made a substantial showing of the denial of a constitutional right." *Id.* "Under the controlling standard, a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.*

The Court recognized that a determination as to whether a COA should be issued "requires an overview of the claims in the habeas petition and a general assessment of their merits." *Id.* The Court in *Miller-El* looked to the district court's application of AEDPA to Mr. Miller-El's constitutional claims and asked whether that resolution was debatable amongst jurists

of reason. The Court explained:

> This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.
>
> To that end, our opinion in *Slack* [*v. McDaniel*, 529 U.S. 473 (2000),] held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "'has already failed in that endeavor.'" *Barefoot* [*v. Estelle*, 463 U.S. 880,] 893, n.4. [(1983)].

Id. at 1039. The Court proceeded to stress that the issuance of a COA must not be or a matter of course. The Court clearly

defined the test for issuing a COA as follows:

> A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot*, at 893. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail. As we stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S. at 484.

Id. at 1040.

Pursuant to the test articulated in *Miller-El*, an overview of the claims set forth in Petitioner Benton's habeas petition reveals that the claims are debatable amongst jurists of reason. Both of the claims raised in Petitioner Benton's habeas petition concern the denial of a constitutional right. Regarding the involuntary plea claim, "[t]he fourteenth amendment due

process clause requires that a plea of guilty be knowingly and voluntarily entered because it involves a waiver of a number of the defendant's constitutional rights." *Gaddy v. Linahan*, 780 F.2d 935, 943 (11th Cir. 1986). Regarding the ineffective assistance of counsel claim, in *Strickland*, the Court established that implicit in the Sixth Amendment's guarantee of a criminal defendant's right "to have the Assistance of Counsel for his defence," U.S. Const. amend. VI, is the right to the effective assistance of counsel. *See Strickland*, 466 U.S. at 686. The Court has recognized that the Sixth Amendment right to counsel is extended to defendants in state court criminal proceedings through the Fourteenth Amendment. *See Ferguson v. Georgia*, 365 U.S. 570, 596 (1961).

Petitioner Benton's involuntary plea claim has been raised at every stage of the judicial process yet no court (state or federal) has held an evidentiary hearing on whether Petitioner Benton was under the influence of psychotropic medications at

the time he entered his plea. Whether or not Petitioner Benton is finally entitled to an evidentiary hearing on his claim is a matter is debatable amongst jurists of reason.

Turning to the ineffective assistance of counsel claim, the state court's decision was contrary to, or involved an unreasonable application of, clearly established federal law, and the decision was based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d). The prejudice standard under *Strickland* requires a defendant to establish that but for the ineffectiveness of counsel, the result of the proceeding would have been different. Generally, this means that the defendant must establish that he would not have been found guilty by a jury. However, for claims of ineffectiveness of counsel regarding defendants that enter guilty pleas, the prejudice standard is merely that but for the ineffectiveness of counsel, the defendant would not have entered the plea. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Ostrander v. Green*, 46 F.3d

347, 352 (4th Cir. 1995), *overruled on other grounds, O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir.1996) (en banc). The state court cited only to *Strickland*, not to *Hill* or *Ostrander*; therefore there is no way to be sure that the court applied the proper standard for ineffectiveness relating to guilty pleas.

In rejecting Petitioner Benton's ineffective assistance of counsel claim, the magistrate judge accepted the state court's factual findings.[8] The magistrate judge concluded that "Petitioner has failed to establish that the state court's decision was based upon an unreasonable determination of the facts." (A-24). In *Miller-El v. Cockrell*, the Court stated:

> AEDPA does not require petitioner to prove that a decision is objectively unreasonable by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions. Subsection (d)(2) contains the unreasonable requirement and applies to the granting of habeas relief . . . .

---

[8] In its order denying Petitioner Benton's habeas petition, the district court adopted the magistrate judge's Report and Recommendation. (A-28).

123 S. Ct. at 1042. Pursuant to *Miller-El*, the magistrate judge applied the wrong standard in rejecting Petitioner Benton's petition, as the "reasonableness" standard does not apply to determinations of factual issues. Contrary to the magistrate judge's conclusion, Petitioner Benton was not required to prove that the state court's factual findings were unreasonable, only that they were rebutted by clear and convincing evidence. "A federal court can disagree with a state court's credibility determination and, when guided by AEDPA, conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence." *Miller-El*, 123 S. Ct. at 1041. The record establishes that defense counsel was aware that Petitioner Benton was intoxicated at the time of the offense yet counsel failed to inform Petitioner Benton of a possible intoxication defense. Whether the state court's decision was contrary to clearly established federal law and whether the district court erred in applying § 2254(e)(1) are

matters debatable amongst jurists of reason.

I. CONCLUSION

Both claims set forth in Petitioner Benton's habeas petition present questions debatable amongst jurists of reason. Petitioner Benton has made a substantial showing of a denial of a constitutional right. "Reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 123 S. Ct. at 1040. Accordingly, the Eleventh Circuit erred by denying Petitioner Benton's motion for a certificate of appealability. Petitioner Benton respectfully requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

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COUNSEL FOR PETITIONER

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2002

GERALD R. BENTON,
Petitioner,

v.

JAMES V. CROSBY,
Respondent.

Appendix to
Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GERALD BENTON,

Petitioner,

vs. 3:02cv250/LAC/MCR

Michael W. Moore,

Respondent,

_____/

REPORT AND RECOMMENDATION

This matter is before the court upon a petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254, with a supporting memorandum. (Docs. 1, 10). Respondent filed a response, and Petitioner replied. (Docs. 9,12). The matter is referred to the undersigned magistrate judge for report and recommendation pursuant to 28 U.S.C. § 636 and N.D. Fla. Loc. R. 72.2(b). After careful consideration of all issues raised by Petitioner, it is the opinion of the undersigned that no evidentiary hearing is required for the disposition of this matter, Rules Governing Section 2254 Cases 8(a). It is further the opinion of the undersigned that the pleadings and attachments

before the court show that Petitioner is not entitled to relief.

I. BACKGROUND

The procedural history of Petitioner's instant conviction is not in dispute. The information charged Petitioner with armed robbery with a firearm, burglary of a dwelling with assault and battery, burglary of a dwelling while armed, and possession of a firearm by a convicted felon. (Doc. 9, Ex. A at 01). On October 16, 1996, pursuant to a written plea agreement, Petitioner entered a plea of *nolo contendere* to the charges. (*Id.* at 20-21). After conducting a plea colloquy, the court set the case for sentencing on December 5, 1996. (*Id.* at 06-19). On December 5, Petitioner's counsel informed the court that Petitioner wished to withdraw his guilty plea because he was taking medication which rendered him mentally incompetent at the time of his plea. (Doc. 10 at 5; doc. 9 at 2). The court set a hearing on Petitioner's motion for February 20, 1997. (*Id.*).

At the February hearing, Petitioner's counsel informed the court that she had discussed Petitioner's medical records with a doctor at the jail where Petitioner was being housed throughout the proceedings, and the doctor indicated that Petitioner's medications did not impair his ability to function, rather, they enabled him to think clearly. (Doc. 9, Ex. A at 26-

27). The court then took testimony from Petitioner, and denied the *ore tenus* motion to withdraw his plea. (*Id.* at 35-36, 39).

On March 20, 1997, the court sentenced Petitioner as a habitual violent felony offender on Counts 1 and 3 to concurrent terms of life imprisonment with a minimum mandatory of fifteen years on each count. (*Id.* at 64). On Count 2, the court sentenced Petitioner as a habitual felony offender to a term of life imprisonment to run concurrent with the sentence imposed on Counts 1 and 3. (*Id.* at 64-65). The court also habitualized Petitioner on Count 4, and sentenced him to a term of thirty years of imprisonment to run concurrent with the sentences on the other three counts. (*Id.*).

Petitioner directly appealed his conviction on the following grounds:

> 1. Counsel rendered constitutionally ineffective assistance by failing to file a written motion to withdraw the plea, failing to investigate whether grounds existed to withdraw the plea, and failing to conduct "pre-trial planning and strategy sessions" with Petitioner, and
>
> 2. The oral sentence pronounced by the court conflicted with the written judgment because the sentencing court orally sentenced Petitioner to terms of "life" imprisonment, but the written judgment sentenced him to terms of "natural life."

(Doc. 9, Ex. A, Appellant's Brief). The Florida First District Court of Appeal ("First DCA") affirmed the conviction and sentences per curiam on the grounds that Petitioner's ineffective assistance claims were not cognizable on direct appeal and must be raised in collateral proceedings, and his remaining claim had no merit. *Benton v. State*, 729 So.2d 411 (Fla. 1st DCA 1999).

On June 28, 1999, Petitioner filed a motion for post-conviction relief under Rule 3.850 of the Florida Rules of Criminal Procedure on the following grounds:

> 1. The trial court violated Petitioner's due process rights by failing to conduct a proper plea colloquy prior to accepting the plea;
>
> 2. The trial court violated Petitioner's due process rights by arraigning him and accepting his plea prior to the filing of the information by the State;
>
> 3. The trial court lacked jurisdiction to adjudicate Petitioner guilty because the information filed by the State was insufficient;
>
> 4. Petitioner was denied effective assistance of counsel based upon the following errors: (1) failure to file a motion to withdraw the plea base upon the State's failure to file the information prior to entry of the plea; (2) failure to investigate withdrawal of the plea based upon Petitioner's mental incompetence due to the

> influence of psychotropic medication; (3) failure to investigate and seek dismissal of the information based upon its legal insufficiency, and (4) improperly advising Petitioner that he could not assert voluntary intoxication as a defense, and
>
> 5. The trial court erred in accepting Petitioner's plea while Petitioner was under the influence of psychotropic drugs and suffering from mental illness.

(Doc. 9, Ex. B at 1-41). The trial court summarily denied the Rule 3.850 motion. (*Id.* at 70-76). Petitioner appealed the denial to the First DCA; and the appellate court affirmed per curiam, except as to the claim on ineffective assistance of counsel based upon counsel's advising Petitioner that he could not assert a voluntary intoxication defense. *Benton v. State*, 763 So.2d 548 (Fla. 1st DCA 2000). The case was reversed and remanded for an evidentiary hearing on that claim.

Following an evidentiary hearing, at which Petitioner was represented by appointed counsel, the trial court denied relief on the remanded ineffective assistance claim. (Doc. 9, Ex. C at 338-43). Petitioner appealed the denial to the First DCA; and the appellate court affirmed per curiam without opinion. (Doc. 9, Ex. C).

In the instant federal habeas action, Petitioner alleges

two grounds for relief: (1) his plea was unintelligent because he was under the influence of psychotropic medication at the time it was entered, and (2) he was denied effective assistance of counsel because his counsel failed to investigate a voluntary intoxication defense. Respondent concedes that Petitioner exhausted his state court remedies with regard to all of his claims, but contends that Petitioner is not entitled to federal habeas relief.

II. STANDARD OF REVIEW

Section 2254(a) of Title 28 provides, "a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court upon a showing that his custody is in violation of the Constitution or laws of the United States." As the instant petition was filed after April 24, 1996, it is subject to the more deferential standard for habeas review of state court decisions under § 2254 as brought about by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). Pub. L. 104-132, § 104, 110 Stat. 1214, 1218-19.

Section 2254 now provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated

> on the merits in State court proceedings unless the adjudication of the claim-
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (West Supp. 2001). Additionally, § 2254(e)(1) sets forth a highly deferential standard of review for factual determinations made by a state court: "[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." *Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001), *cert. denied*, ___U.S.___, 122 S. Ct. 2310 152 L. Ed. 2d 1065 (2002) (quoting 28 U.S.C. § 2254(e)(1); *Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir. 2000)).

The United States Supreme Court explained the framework of § 2254 review in *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). The appropriate test in habeas cases was described by Justice

O'Connor as follows:

> In sum, § 2254(d)(1) places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court. Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied - the state court adjudication resulted in a decision that (1) "was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Id., 529 U.S. at 412-13 (O'Connor, J., concurring). Under the test just described, a habeas court does not examine the state court's ruling to determine whether it is correct, but examines

it only to ascertain whether the state court applied Supreme Court law unreasonably. *Id.* at 411.

The Eleventh Circuit essentially developed a three-step process for applying the *Williams* test to any issue raised in a federal habeas petition upon which there has been an adjudication on the merits in a formal state court proceeding. *See Robinson v. Moore*, 300 F.3d 1320, 1343-45 (11th Cir. 2002); *Fugate*, 261 F.3d 1206. First, the court must ascertain the controlling legal principles that are clearly established by the Supreme Court at the time of the state court's adjudication. *Robinson*, 300 F.3d at 1343.

Second, the court must determine whether the state court adjudication was contrary to the clearly established Supreme Court law. *Id.* At 1344. "The 'contrary to' clause in § 2254(d)(1) 'suggests that the state court's decision must be substantially different' from the relevant Supreme Court precedent." *Fugate*, 261 F.3d at 1216 (quoting *Williams*, 529 U.S. at 405). "Although a state court's decision that 'applies a rule that contradicts' the governing Supreme Court law is 'contrary,' a state court decision that applies 'the correct legal rule' based on Supreme Court law to the facts of the petitioner's case would not fit within the 'contrary to' clause even if the federal court might have reached a different result relying on

the same law." *Id.* (Citing and quoting *Williams*, 529 U.S. at 405). If the state court applied the correct Supreme Court precedent, and the United States Supreme Court, faced with materially indistinguishable facts, has not reached a decision different from the decision reached by the state court in the petitioner's case, the case does not fit within the "contrary to" clause, and the federal habeas court must go to the third step and determine whether the state court "unreasonably applied the relevant Supreme Court authority." *Id.* Likewise, if the facts of the Supreme Court cases and the petitioner's case are not substantially similar, "a state court decision that applies 'the correct legal rule' based on Supreme Court law to the facts of the petitioner's case would not fit within the 'contrary to' clause even if the federal court might have reached a different result relying on the same law." *Fugate*, 251 F.3d at 1216 (citing and quoting *Williams*, 529 U.S. at 406).

The standard for an unreasonable application inquiry is "whether the state court's application of clearly established federal law was objectively unreasonable." *Williams*, 529 U.S. at 410. Recently, the Supreme Court further explained that "a federal habeas court may not issue a writ under the unreasonable application clause 'simply because that court concludes in its independent judgment that the relevant state-

court decision applied clearly established federal law erroneously or incorrectly.'" *Bell v. Cone*, ___U.S.___, 122 S. Ct. 1843, 1849, 152 L. Ed. 2d 914 (2002) (quoting *Williams*, 529 U.S. at 411). The state court's incorrect application of clearly established law will be held to be reasonable and not warrant a writ unless "thorough analysis by a federal court produces a firm conviction that that [the state court] judgment is infect by constitutional error." *Williams*, 529 U.S. at 389.

III. PETITIONER'S CLAIMS

In the instant federal habeas action, Petitioner raises two of the same claims that he raised in state court:

> Ground one: Conviction obtained by plea of nolo contendere which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequence of the plea.
>
> Ground two: Denial of effective assistance of counsel - - failure to investigate defense of voluntary intoxication.

A. *Involuntary Plea*

Petitioner claims that his no contest plea was not knowing and voluntary because he was under the influence of psychotropic medication at the time of the plea. Petitioner contends that the trial court improperly denied his motion to

withdraw his plea. Specifically, Petitioner asserts that the trial court should not have accepted the representation of Petitioner's trial counsel that she had discussed Petitioner's medical records with Petitioner's doctor, and the doctor informed her that the drugs did not impede Petitioner's ability to think clearly. (See doc. 10 at 12; doc. 9, Ex. A at 26-27). Petitioner argues that the trial court should have conducted an independent inquiry of Petitioner's doctor, or another expert, regarding the effect of Petitioner's medication on his ability to appreciate the consequences of his plea.

1. Clearly Established Federal Law

As summarized in *Bailey v. Nagle*, 172 F.3d 1299 (11th Cir. 1999), a state habeas petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default, or that a fundamental miscarriage of justice will result. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Adlerman v. Zant*, 22 F.3d 1541, 1549 (11th Cir. 1994). A state court decision based on state law grounds that are independent of federal law and adequate to support the judgment may create a procedural default barring federal habeas review. *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2554, 115 L.

Ed. 2d 640 (1991). Thus, where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the federal claims are barred, the federal court shall respect that decision. *Nagle*, 172 F.3d 1299 (citing *Atkins v. Singletary*, 965 F.2d 952, 956 (11th Cir. 1992)). In reviewing the state court's judgment, this court must ask whether the last state court to consider the claim(s) clearly and expressly stated that its judgment rested on a procedural bar, meaning, an adequate and independent state ground. *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989). Furthermore, an appellate court's per curiam affirmance of a decision that is based on a procedural bar is deemed to affirm the procedural bar. *Yist v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 2594, 115 L. Ed. 2d 706 (1991); *Harmon v. Barton*, 894 F.2d 1268, 1273 (11th Cir. 1990).

To establish "cause" sufficient to overcome the procedural bar, Petitioner must show the existence of "an external impediment, whether it be governmental interference or the reasonable unavailability of the factual basis for the claim "which prevented him from raising the claim. *McCleskey v. Zant*, 499 U.S. 467, 497, 111 S. Ct. 1454, 1472, 113 L. Ed. 2d 517 (1992) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986)). In order to show

prejudice, Petitioner must show not merely that the error created a *possibility* of prejudice, but that it worked to his *actual* and substantial disadvantage, infecting the entire proceeding with error of constitutional dimensions. *See United States v. Frady*, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816 (1982).

2. State Court Proceedings

Petitioner raised an identical claim in his Rule 3.850 motion, and the trial court determined that the claim was procedurally barred because Petitioner should have raised it on direct appeal. (Doc. 9, Ex. B at 09, 38-39, 75-76). In reaching this conclusion, the court relied upon *Williamson v. Dugger*, where the Florida Supreme Court held that a petitioner is procedurally barred from asserting claims in a Rule 3.850 motion that "either could or should have been raised on direct appeal." 651 So. 2d 84, 87 (Fla. 1993). The First DCA affirmed per curiam the trial court's denial of this claim. *Benton v. State*, 763 So.2d 548 (Fla. 1st DCA 2000).

3. Federal Review of State Court Decision

The trial court correctly applied the procedural default principle set forth in *Williamson*. Florida law provides that a criminal defendant who pleads no contest may directly appeal the issue of the voluntariness of his plea if he has previously

raised the identical claim in a motion to withdraw his plea. See FLA.R.APP.P.9140(b)(2)(ii)(c); *see also Dooley v. State*, 789 So.2d 1082, 1083 (Fla. 1st DCA 2001) (claim raised in motion to withdraw plea must be challenged by direct appeal, not postconviction motion) (dicta); *Perkins v. State*, 647 So.2d 202, 203 (Fla. 1st DCA 1994) (if trial court denies motion to withdraw plea, decision can be reviewed on direct appeal) (citing *Robinson v. State*, 373 So.2d 898, 902 (Fla. 1979)) (dicta).

In the instant case, the sole basis for Petitioner's *ore tenus* motion to withdraw his no contest plea was his claim that the medication he was taking at the time of his plea prevented him from understanding the consequences of the plea. (Doc. 9, Ex. A at 25-37, 39). On direct appeal, Petitioner failed to challenge his plea on the ground that the trial court erroneously denied his motion to withdraw the plea, despite the fact that the issue was preserved for appellate review.[1]

---

[1] Petitioner raised the following issues on direct appeal:

> 1. Counsel rendered constitutionally ineffective assistance by failing to file a written motion to withdraw the plea, failing to investigate whether grounds existed to withdraw the plea, and failing to conduct "pre-trial planning and strategy sessions" with Petitioner, and

Additionally, Petitioner has made no effort to establish cause for overcoming the procedural bar. He does not allege that he was unaware of or deprived of the opportunity to promptly challenge the voluntariness of his plea by raising the issue on direct appeal. Because Petitioner has failed to allege or demonstrate the existence of some factor or occurrence external to his control, he has failed to establish cause. *See Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); *Harmon*, 894 F.2d at 1274-75.

Based upon the foregoing, this court finds that the state court correctly applied the procedural default principle of state law. Petitioner is no longer able to present the instant claim to the state courts, and he has failed to show the requisite cause to excuse his procedural default or establish a fundamental miscarriage of justice through a colorable showing of actual innocence, *see Schlup v. Delo*, 513 U.S. 298, 324-27, 115S. Ct. 851, 130 L. Ed. 2d 808 (1995). Therefore, this claim is barred from federal habeas review.

B. *Ineffective Assistance of Counsel*

---

2. The oral sentence pronounced by the court conflicted with the written judgment because the sentencing court orally sentenced Petitioner to terms of "life" imprisonment, but the written judgment sentenced him to terms of "natural life."

Petitioner next claims that he received ineffective assistance of counsel because his trial counsel failed to investigate and inform him of the availability of a voluntary intoxication defense. Petitioner asserts that he told his counsel that he had been drinking heavily on the day of the offenses, but counsel told him that intoxication was not a defense. Petitioner alleges that if counsel had advised him of the availability of the defense, he would not have pled no contest and would have gone to trial. (Doc. 1 at 7).

1. Clearly Established Federal Law

In order to prevail upon a claim of ineffective assistance of counsel, Petitioner must prove that: (1) "counsel's representation fell below an objective standard of reasonableness," and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In applying this test, "reviewing courts must indulge a strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance." *Smith v. Singletary*, 170 F.3d 1051, 1053 (11th Cir. 1999); *Harich v. Dugger*, 844 F.2d 1464, 1469 (11th Cir. 1988); *Lancaster v. Newsome*, 880 F.2d 362, 375 (11th Cir. 1989) ("emphasizing

that petitioner was 'not entitled to error-free representation'")). Counsel's performance is presumed to have been reasonable and adequate. *Strickland, supra*. In order to show prejudice, Petitioner must allege more than simply that the unreasonable conduct might have had "some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067. Instead, Petitioner must show a reasonable probability exists that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. In applying *Strickland*, the court may dispose of an ineffective assistance claim if Petitioner fails to carry his burden on either of the two prongs. *Id.* at 697, 104 S. Ct. at 2069.

In a plea situation, counsel must provide advice "within the range of competence demanded of attorneys in criminal cases." *Hill v. Lockhart*, 474 U.S. 52, 56-57, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449, 25 L. Ed. 2d 763 (1970)). Under this standard, representation is ineffective only if counsel commits "serious derelictions" of his duty when advising the accused. *Stano v. Dugger*, 921 F.2d 1125, 1150-51 (11th Cir. 1991). Absent such blatant errors, however, the court should "indulge a strong presumption that counsel's conduct

fell within the wide range of reasonably professional assistance." *Yordan v. Dugger*, 909 F.2d 474, 477 (11th Cir. 1990).

To meet the prejudice prong of the *Strickland* standard in a plea situation, Petitioner must prove that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59, 106 S. Ct. 370. Often this analysis hinges upon whether eradication of the error would have led counsel to change his recommendation as to the plea, which in turn generally depends on whether the outcome of a trial would have been substantively different. *Id.* at 59-60, 106 S. Ct. at 370-71. Conclusory statements, given after the fact, are insufficient to meet this burden. *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991). In applying *Strickland*, the court may dispose of an ineffective assistance claim if Petitioner fails to carry his burden on either of the two prongs. *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069.

2. State Court Proceedings

Initially, the trial court summarily denied Petitioner's ineffective assistance claim (doc. 9, Ex. B at 70-76); however, the First DCA reversed and remanded for an evidentiary hearing.

At the evidentiary hearing, the trial court heard testimony from Petitioner, Petitioner's wife, and Petitioner's trial counsel, Ms. Mader. (*Id.* at 195-305). Documentary evidence was also submitted, including notes taken by counsel's investigator during the investigator's "intake" meeting with Petitioner, a letter from Petitioner to counsel, and several letters from Petitioner's wife to counsel, the prosecutor, and the trial court. (*Id.* at 307-27).

Petitioner testified that on the day of the crimes he "was totally out of it" and had "never been that drunk before." (*Id.* at 339). He stated that his wife had observed his intoxication level. (*Id.*). Petitioner also stated that he informed his trial counsel, Ms. Mader, of these facts. (*Id.*.). He testified that Ms. Mader "*never discussed any possible defenses with him*," including voluntary intoxication, but she did inform him that "being drunk is no excuse." (*Id.*) (Emphasis in original, internal quotations omitted).

The trial court found that Petitioner's testimony was contradicted by the testimony of Ms. Mader, his trial counsel. (*Id.*). Ms. Mader testified that after she learned from both Petitioner and her investigator that Petitioner had consumed alcohol on the day he committed the crimes, she informed Petitioner that involuntary intoxication was a potential defense.

(*Id.* at 338-39). She also testified that she told Petitioner that although she did not favor the intoxication defense, he had nothing to lose by going to trial, and she made it clear to Petitioner that the decision whether or not to go to trial was his. (*Id.* at 340). Ms. Mader testified that she did not favor an intoxication defense because it would require Petitioner to testify, he could be impeached with his prior felony convictions, and jurors "don't like" convicted felons as witnesses. (*Id.*).

Ms. Mader further testified that Petitioner wished to enter a plea from the beginning. (*Id.*). This testimony was supported by a letter from Petitioner to counsel requesting that she withdraw his no contest plea on the ground that he had ignored her advice because he had hoped for a speedy resolution to the case. (*Id.*). Finally, Ms. Mader testified that in her professional judgment Defendant's best chance to obtain the shortest term of imprisonment was to pursue a plea negotiation strategy whereby Petitioner would avoid the cost of a trial, demonstrate remorse, and cooperate as much as possible. (*Id.*).

Petitioner also presented the testimony of Mrs. Benton, Petitioner's wife. She stated that she saw Petitioner on the day of the offenses and observed him drinking two beers, moving slowly, talking slowly, and smelling of alcohol. (*Id.* at 341). In

her opinion, he was drunk. (*Id.*). Mrs. Benton also state that she tried to inform Ms. Mader of this fact through telephone calls and letters. (*Id.*).

The court found that Ms. Benton's testimony was contradicted by Ms. Mader's testimony, as well as documentary evidence submitted at the evidentiary hearing. Ms. Mader testified that she never received information that Petitioner had been drinking from anyone except her investigator and Petitioner. (*Id.*). She stated that although she received numerous letters and at least one telephone call from Mrs. Benton, Benton did not offer facts that indicated that Mader should look further into a voluntary intoxication defense, nor did she state anything that suggested that she was a potential witness. (*Id.*). The trial court determined that the letters themselves supported counsel's testimony. (*Id.* at 342). The State submitted five letters from Mrs. Benton, three addressed to counsel (all of which predated Petitioner's plea), one addressed to the prosecutor, and two addressed to the court. (*Id.*). None of the letters indicated that Mr. Benton personally observed Petitioner consuming alcohol on the day of the offenses, or that, based upon her personal observations of Petitioner on that day, he was intoxicated. (*Id.*).

Based upon the state court's personal observations of

Petitioner, Mrs. Benton, and Ms. Mader, the court found Ms. Mader's testimony more credible than the testimony of Petitioner or Mrs. Benton, and concluded that Petitioner failed to satisfy the deficient performance prong of the Strickland test. (*Id.* at 338-39, 343). The court made specific factual findings that Ms. Mader informed Petitioner of a possible intoxication defense, but from the beginning, Petitioner directed counsel to enter a plea to avoid trial and bring the case to a speedy end. (*Id.*). The court concluded, "Given Defendant's apparent predisposition to pursue plea negotiations with the State and Defendant's vulnerability to impeachment regarding a prior felony conviction, counsel's conduct did not stray outside the boundaries of reasonable professional conduct under the circumstances." (*Id.*).

The First DCA affirmed the trial court's denial per curiam without opinion. (Doc. 9, Ex. C).

3. Federal Review of State Court Decision

As previously discussed in reviewing a state court decision, this court must presume that the state's court's findings of fact are correct. Petitioner has the burden of rebutting the presumption of correctness by clear and convincing evidence. *Fugate*, 261 F.3d at 1215; *Bottoson*, 234 F.3d at 531; *see also McCoy v. Newsome*, 953 F.2d 1252, 1263

(11th Cir. 1992) (subsidiary findings, such as circumstances of defendant's interrogation and actions of law enforcement officers "are entitled to a presumption of correctness if fairly supported by the record"); *Harris v. Dugger*, 874 F.2d 756, 762 (11th Cir. 1989) ("As the Court stated in *Miller* [*v. Fenton*, 474 U.S. 104, 112, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985)], " . . . subsidiary factual questions, such as . . . whether in fact the police engaged in the intimidation tactics alleged by the defendant . . . are entitled to the § 2254 (d) presumption.").

Additionally, "[w]hen a state court fails to make explicit findings, a state court's denial of the claim 'resolves all conflicts in testimony bearing on that claim against the criminal defendant.'" *Waldrop v. Jones*, 77 F.3d 1308, 1316 (11th Cir. 1985) (quoting *Colombe v. Connecticut*, 367 U.S. 568, 604-05, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961)); *Baldwin v. Johnson*, 152 F.3d 1304, 1320-21 (11th Cir. 1998).

Initially, Petitioner has failed to establish that the state court's decision was based upon an unreasonable determination of the facts. Petitioner has failed to present clear and convincing evidence that the trial court improperly credited the testimony of Petitioner's counsel, which was supported by documentary evidence, instead of the testimony of Petitioner and his wife. Petitioner has failed to provide clear and

convincing evidence that his counsel failed to inform him of a possible intoxication defense, or that counsel was provided information, from Petitioner or his wife, that indicated she should pursue this defense. Likewise, Petitioner has failed to show that the trial court incorrectly concluded that Petitioner instructed his counsel from the beginning to enter a plea and avoid trial. Therefore, this court accepts the state court's factual findings, including its credibility determinations, as correct.

Additionally, Petitioner has failed to show that the state court's decision was contrary to or an unreasonable application of Supreme Court law. Petitioner contends that the state court incorrectly applied *Strickland* and *Hill* in determining that Petitioner failed to establish a Sixth Amendment violation. Specifically, Petitioner argues that the state court required Petitioner to show that but for his counsel's errors, he would not have been convicted, whereas the correct standard was a simple showing that but for the error, he would have insisted on going to trial.

The state court articulated the appropriate standard as follows: "to prevail on the claim of ineffective assistance of counsel, *a defendant must demonstrate*: (1) that counsel's performance was deficient, and (2) there is a reasonable

probability that the outcome of the proceeding would have been different had counsel not been deficient." (Emphasis in original; citations omitted). (Doc. 9, Ex. C at 338-39). The court then concluded that Petitioner failed to satisfy the deficient performance prong, and denied relief. (*Id.* At 339, 343). The court's conclusion that counsel's performance" did not stray outside the boundaries of reasonable professional conduct under the circumstances," based upon the factual determinations described *supra*, was not contrary to or an unreasonable application of *Strickland*. Furthermore, contrary to Petitioner's contention, the state court did not apply an incorrect "prejudice" standard. In fact, the court did not address the prejudice prong at all, which was appropriate, since Petitioner failed to satisfy the first prong of the *Strickland* analysis. *See Strickland*, 466 U.S. at 697, 694, 104 S. Ct. at 2069 (court may dispose of ineffective assistance claim if Petitioner fails to carry his burden on either of the two prongs).

In summary, Petitioner has failed to establish that the court's decision was based upon an unreasonable determination of the facts, or that it was contrary to or an unreasonable application of *Strickland*. Therefore, he is not entitled to federal habeas relief on this claim.

For the aforementioned reasons, it is respectfully

RECOMMENDED:

That the petition for writ of habeas corpus (doc. 1) be DENIED with prejudice.

At Pensacola, Florida this 26th day of February, 2003.

/s/ M. Casey Rodgers
M. Casey Rodgers
United States Magistrate Judge

NOTICE TO THE PARTIES

Objections to these proposed findings and recommendations may be filed within ten days after being served a copy thereof. A copy of objections shall be served upon the magistrate judge and all other parties. Failure to object may limit the scope of appellate review of factual findings. *See* 28 U.S.C. § 636; *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GERALD BENTON,
Petitioner,

vs. 3:02cv250/LAC/MCR

Michael W. Moore,
Respondent,

_____/

ORDER

Upon consideration of the Recommendation of the Magistrate Judge filed pursuant to 28 U.S.C. §636(b)(1)(B), and after reviewing objections to the Recommendation, the Recommendation is adopted as the opinion of the Court.

The Petition for Writ of Habeas Corpus (doc. 1) is DENIED with prejudice and judgment shall be entered accordingly.

DONE AND ORDERED this 3rd day of April, 2003.

/s/ L A. Collier
LACEY A. COLLIER
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GERALD BENTON,

Petitioner,

vs. 3:02cv250/LAC/MCR

Michael W. Moore,

Respondent,

_____/

JUDGMENT

Pursuant to and at the direction of the Court, it is ORDERED AND ADJUDGED that the Petition for Writ of Habeas Corpus is DENIED with prejudice.

WILLIAM M. McCOOL,
CLERK OF THE COURT

April 3, 2003
DATE

/s/ Lynn C. Uhl
Deputy Clerk: Lynn Uhl

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

GERALD BENTON,
Petitioner,

vs. 3:02cv250/LAC/MCR

JAMES CROSBY[2],
Respondent,

_____/

ORDER

Petitioner has filed a Notice of Appeal (doc.21) of the order entered on April 3, 2003 (doc. 19) denying his habeas petition filed pursuant to 28 U.S.C. § 2254. Petitioner has also filed a Motion for Certificate of Appealability. (Doc. 22). Unless a certificate of appealability is issued, Petitioner may not take an appeal from the final order denying Section 2254 relief. See 28 U.S.C. § 2253(c)(1)(A).

Because the Petitioner has not made a substantial showing of the denial of a constitutional right, and for the reasons set forth in the Magistrate Judge's Report and

[2] Following his appointment as the new Secretary of the Department of Corrections, James Crosby was substituted for Michael W. Moore as Respondent in this action (*See* Doc. 18)

Recommendation filed on February 26, 2003 (doc. 13), a certificate of appealability is DENIED.

DONE AND ORDERED this 7th day of May, 2003.

/s/ L.A. Collier
LACEY A. COLLIER
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-12373-D

GERALD BENTON,

Petitioner-Appellant,

versus

JAMES CROSBY,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Florida

ORDER:

Appellant's original and amended motions for a certificate of appealability and are DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. §2253(c)(2).

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUN 27 2003
THOMAS K. KAHN
CLERK

/s/ R. Lanier Anderson
United States Circuit Judge

28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from -

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall

indicate which specific issue or issues satisfy the showing required by paragraph (2).

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, § 113, 63 Stat. 105; Oct. 31, 1951, c. 655, § 52, 65 Stat. 727; Apr. 24, 1996, Pub. L. 104-32, Title I, § 102, 110 Stat. 1217.)